1995

State of Utah v. Ronnie C. Byrd : Brief of Appellee

Utah Court of Appeals

Linda M. Jones; Judith A. Jensen.
Thomas B. Brunker; Jan graham; Paul B. Parker.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 950399-CA
v.	:	
RONNIE C. BYRD,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM THE DENIAL OF DEFENDANT'S MOTION FOR A NEW TRIAL FOLLOWING CONVICTIONS FOR TWO COUNTS OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, THIRD DEGREE FELONIES, PURSUANT TO UTAH CODE ANN. § 58-37-8(1)(b)(ii) (1996), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL R. MURPHY PRESIDING

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant Ronnie Byrd appeals his conviction for two counts of possession of a controlled substance, third degree felonies, pursuant to Utah Code Ann. § 58-37-8(1)(b)(ii) (1996) (R. 121-22). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1995).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court properly deny defendant's motion for a new trial based on testimony referring to defendant's post-arrest silence where defendant affirmatively waived his right to remain silent and subsequently confessed to purchasing the seized narcotics?

2. Did the trial court properly deny defendant's motion

for a new trial based on the State's failure to inform defense counsel about changed testimony where the change did not impair defendant's ability to present his theory of the case?

The standard of review is the same for both issues. The trial court has a "wide range of discretion in determining" whether to grant a motion for a new trial. State v. James, 819 P.2d 781, 793 (Utah 1991). This Court assumes that the trial court properly exercised its discretion "unless the record clearly shows the contrary." Id.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains the text of Utah Code Ann. § 58-37-8(1)(b)(ii)(1996).

STATEMENT OF THE CASE

The State charged defendant with two counts of unlawfully possessing a controlled substance, third degree felonies, pursuant to Utah Code Ann. § 58-37-8(1)(b)(ii) (1996) (R. 7). The jury convicted defendant on both counts (R. 121-22).

The trial court sentenced defendant to two concurrent prison terms of zero-to-five years (R. 201-202). Defendant timely filed a motion for a new trial (R. 135). The trial court denied the motion, and defendant timely filed his notice of appeal from the denial (R. 209).

STATEMENT OF FACTS

On October 12, 1993, a surveillance team watched Pioneer Park for drug activities (R. 358-59). In the early evening, that team consisted of one surveillance officer and a "take-down" unit consisting of a marked police car driven by a uniformed officer, Officer Kaufman, and an unmarked car driven by a plain clothes detective, Detective Thurgood (R. 358-59, 408-409, 471, 474-75).

Officer Grant watched the north curb from the team's surveillance station on the second story of a building across the street (R. 359-60). When Officer Grant observed a tan Escort station wagon pull up, he focused his camera on the car, then moved to his sixty-power spotting scope to observe the car (R. 362-65, 370). A man approached the passenger side of the car where defendant was seated, appeared to have a short conversation defendant, then walked away (R. 370-71, 482).

A second man ("seller") approached the passenger side (R. 371). This man carried a "twist" (a package commonly containing cocaine) between his thumb and forefinger (R. 354-55, 371). The seller also appeared to speak to defendant (R. 371). The seller then turned his back to Officer Grant, and when he turned around again, he held a larger plastic bag that appeared to have several twists in it (R. 371-72).

The seller passed the original twist into the car, then took something else from the bag and passed that into the car (R. 372). Defendant then handed the second man some cash, and the car left (id.).

Officer Grant radioed the take-down unit that the passenger in the Escort had purchased drugs (R. 410, 479). Detective Thurgood followed the car, and Officer Kaufman joined him (R. 411, 479-80). Officer Kaufman signaled the car to stop; although the drive eventually complied, he took longer the usual to stop (R. 411). Officer Kaufman approached the driver and spoke to the driver and rear passenger while Detective Thurgood removed defendant from the front passenger side (R. 411, 414, 482-83). Detective Thurgood took defendant to the rear of the Escort where he arrested defendant and informed him of his Miranda rights (R. 483). Detective Thurgood then searched the front passenger area and discovered a "twist" of cocaine and a "chip" of heroin under the front passenger seat (R. 484-85).

On the way to jail, defendant admitted to Detective Thurgood that he had purchased the drugs seized (R. 490). At trial, defendant admitted that a drug purchase took place, but testified that the driver purchased a package of "white" (cocaine) and one of "black" (heroin) (R. 560-61).

The argument sections contain additional relevant facts.

SUMMARY OF THE ARGUMENT

1. Post-arrest silence. Defendant claims that the prosecutor violated his Fifth Amendment right to remain silent by eliciting testimony about his post-arrest silence, as proscribed by Doyle v. Ohio, 426 U.S. 610 (1976); therefore, according to defendant, the trial court abused its discretion when it denied defendant's motion for a new trial based on the post-arrest silence evidence. Defendant's argument fails because: 1) he waived his right to remain silent and agreed to talk to the police; therefore, the Doyle proscription does not apply; and 2) the record contains overwhelming evidence of defendant's guilt, including his confession.

2. Failure to disclose inculpatory information. Defendant also contends that the trial court should have granted his motion for a new trial because one of the State's witnesses refreshed his memory and consequently gave a different account at trial than he gave defense counsel during a pre-trial interview. Defendant argues that, had his counsel know about the change, she could have tailored the defense accordingly. The trial court correctly found that any error was harmless. Defense counsel presented a coherent defense based on the evidence introduced.

On the other hand, the State presented overwhelming evidence of defendant's guilt.

ARGUMENT

INTRODUCTION

Defendant appeals from the denial of his motion for a new trial. Defendant based his motion on two arguments: 1) that the prosecutor elicited testimony commenting on defendant's post-arrest silence; and 2) that a State's witness gave a different account at trial than he gave defense counsel during their interview. In determining whether the trial court erroneously denied the motion, this Court allows the trial court a "wide range of discretion". State v. James, 819 P.2d 781, 793 (Utah 1991). This Court must assume the trial court properly exercised its discretion "unless the record clearly shows the contrary." Id. For the reasons argued below, defendant has not shown that the trial court exceeded the wide discretion it had to deny defendant's motion.

POINT I

TESTIMONY CONCERNING DEFENDANT'S POST-ARREST SILENCE DID NOT JUSTIFY A NEW TRIAL BECAUSE DEFENDANT WAIVED HIS RIGHT TO REMAIN SILENT AND CONFESSED TO THE CRIME

Defendant contends that the trial court should have granted his motion for a new trial because, according to defendant, the

State erroneously elicited testimony from the investigating police officer concerning his post-arrest silence, and erroneously cross-examined him about his failure to given the officer the exculpatory version he told the jury. Appellant's Brief at 8-14. Under the facts of this case, the trial court properly denied the motion because: 1) defendant waived his right to remain silent; therefore, the proscription against commenting on post-arrest silence did not apply; and 2) any violation was harmless beyond a reasonable doubt.

Detective Thurgood testified that, after the stop, he immediately arrested defendant and gave defendant a Miranda warning (R. 483). Defendant said that he understood his rights and wanted to talk to Detective Thurgood (R. 483, 487). Detective Thurgood told defendant that he had a videotape of defendant buying drugs in Pioneer Park; defendant did not respond (R. 484). Detective Thurgood then left defendant in another officer's custody and searched the car (id.).

The next time Detective Thurgood talked to defendant, he said to defendant, "What's up, what's going on?" (R. 488, 490). Defendant responded "that he just wanted to get high, and that he purchased the drugs at Pioneer Park" (R. 490).

During cross examination, the prosecutor asked defendant

whether he ever told Detective Thurgood that the driver had bought the drugs; defendant responded that he did not say anything about drugs to anybody (R. 600-601).

Defendant claims that both Detective Thurman's testimony and the cross-examination amounted to inappropriate comments on his post-arrest silence. Appellant's Brief at 8-14. Therefore, defendant's argument refers to two silences: 1) his failure to respond to a declaratory statement from Detective Thurman that did not ask for a response from defendant; and 2) his failure to tell Detective Thurman the exculpatory version he told the jury.

A. Doyle does not apply because defendant waived his right to remain silent.

The trial court did not determine whether the comments violated Doyle, relying instead on its determination that any error was harmless (R. 207). Nevertheless, Doyle elicited testimony did not violate Doyle because Doyle does not apply to this case.[1]

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that the State violated the defendants' right

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[1]This court "may affirm the trial court's decision to admit evidence on any proper grounds, even though the trial court assigned another reason for its ruling." State v. Gray, 717 P.2d 1313, 1316 (Utah 1986) (citation omitted).

to due process of law when it used the defendant's post-arrest, post-Miranda-warning silence to impeach the defendant. Id. at 618-19. In Doyle, the defendants took the stand and gave an exculpatory version of the events. Id. at 613-14. In cross-examination, the prosecutor used the defendants' post-Miranda silence to impeach the exculpatory testimony. Id. at 614-15. The Supreme Court found that this violated due process because the Miranda warnings implied an assurance that no penalty would follow from remaining silent, and because post-Miranda silence "may be nothing more than the arrestee's exercise of these Miranda rights." Id. at 618-19.

Since Doyle, the Supreme Court has limited its application to post-Miranda-warning silence. For example, the Court refused to extend Doyle to comments on a defendant's pre-arrest silence. Jenkins v. Anderson, 447 U.S. 231, 241 (1980). Similarly, the Court refused to extend the Doyle proscription to comments on post-arrest, but pre-Miranda-warning silence. Fletcher v. Weir, 455 U.S. 603, 606 (1982). Also, when a defendant waives his right to remain silent and tells police a story inconsistent with his trial testimony, the State may use the inconsistency to impeach defendant without violating the Doyle proscription. Anderson v. Charles, 447 U.S. 404, 407-10 (1980). In all three

cases, the Court distinguished Doyle because the government did not induce the defendants' silence by giving the Miranda warnings. Jenkins v. Anderson, 447 U.S. at 241; Fletcher v. Weir, 455 U.S. at 607; Anderson v. Charles, 447 U.S. at 409.

Similarly, the Miranda warnings in this case did not induce defendant to remain silent. To the contrary, defendant told Detective Thurman that he understood his Miranda rights and wanted to talk to the detective (R. 483, 487). Shortly after affirmatively waiving those rights, defendant confessed "that he just wanted to get high, and that he purchased the drugs at Pioneer Park" (R. 490). Because Detective Thurman's Miranda warnings did not induce silence, the Doyle proscription does not apply. Consequently, the State could elicit testimony about defendant's post-arrest failure to respond to a declaratory statement and post-arrest failure to give the exculpatory version he told the jury.

This Court reached a similar conclusion in State v. Harrison, 805 P.2d 769 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991). Harrison was convicted of murder after shooting another man outside a nightclub. At trial, Harrison contended that he shot the victim after he saw a revolver in the victim's

waistband. The prosecutor commented:

> The most incredible story, the added detail of the chrome plated revolver that he saw so well from a distance of fifteen feet sticking out of the waistband of the dead man. Waistband? Waistband? On a dark end street with some back lit things from the Persepolis restaurant? He's so sure he saw that that he's willing to kill a man. No, that's an added detail. He made that up later. He never tells anybody about that.

Id. at 787 (emphasis added). Harrison contended that the comment violated Doyle because the prosecutor used his failure to give his exculpatory explanation to police to impeach his trial testimony. Id. This Court held that Doyle did not apply because the record contained no evidence that Harrison ever invoked his right to remain silent. Id. at 788.

In this case, defendant not only failed to invoke his right, he affirmatively waived it. In this case, as in Harrison, Doyle did not proscribe Detective Thurgood's testimony or the prosecutor's cross-examination questions.

Additionally, defendant's trial testimony independently justified the State's cross-examination about defendant's failure to tell Detective Thurman that the driver, not he, purchased the drugs. When a defendant waives his right to remain silent and gives police a statement, but then gives an inconsistent statement version at trial, the State may impeach the defendant

with his failure to give the trial version to the police. Anderson v. Charles, 447 U.S. at 409; State v. Velarde, 675 P.2d 1194, 1195-96 (Utah 1984). In that circumstance, the prosecutor's questioning does not comment on the defendant's exercise of his right to remain silent; rather, it asks defendant to explain why, if he testified truthfully, he did not tell police the same story. Anderson v. Charles, 447 U.S. at 409.

In Velarde, Velarde told the jury a different version of the events than he told the arresting officer. State v. Velarde, 675 P.2d at 1195. On cross-examination, the prosecutor "asked why [Velarde] had not told the officer that which he had testified to on direct examination." Id. The supreme court concluded that the prosecutor legitimately used the failure to give the exculpatory version to police as a means to impeach Velarde. Id. at 1195-96.

In this case, as in Velarde, the State properly impeached defendant's trial testimony with his failure to recount to Detective Thurgood the same version of the events that he recounted to the jury. Defendant told Detective Thurgood that he purchased the drugs. At trial, however, he testified that the driver, not he, purchased the drugs, that he never even touched the drugs, that he was just haplessly present when the driver

made the purchase, and that he was outraged that the driver involved him in the transaction (R. 556-63, 614-16). Under Velarde, the State could properly point out that defendant did not give this version to police.

Finally, although defendant waived his right to remain silent, he could have invoked that right at any time during questioning. See, e.g., State v. Gutierrez, 864 P.2d 894, 898-99 (Utah App. 1993). However, invoking the right after an initial valid waiver requires the defendant to invoke the right "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis v. U.S., 114 S. Ct. 2350, 2355 (1994)(requiring a clear request for counsel following an initial waiver of that right). See also Coleman v. Singletary, 30 F.3d 1420, 1421 (11th Cir. 1994)(applying the Davis standard to subsequent invocations of the right to remain silent), cert. denied, 115 S. Ct. 1801 (1995); State v. Leyva, 906 P.2d 894, 901 n.3 (Utah App. 1995)(recognizing the Davis standard for an invocation of either right following an initial valid waiver), cert. granted, 916 P.2d 909 (Utah 1996).[2]

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[2]Although this Court acknowledged in Leyva that Davis applies to cases like this where the defendant initially waives

Defendant has not argued and cannot show a subsequent invocation of his right to remain silent. Detective Thurgood informed defendant of his Miranda rights, and defendant affirmatively waived them (R. 483, 487). Detective Thurgood then told defendant that he had a video tape of defendant purchasing drugs; defendant did not respond (R. 484). The next time Detective Thurgood spoke to defendant, he asked defendant what happened and defendant confessed to purchasing the drugs (R. 488-490). At no time did defendant make any statement or do anything that a reasonable officer would have understood amounted to invoking his right to silence, including his failure to respond to the detective's single statement that did not directly ask for defendant to respond.

In sum, the Doyle proscription against using post-arrest silence to impeach defendant does not apply to this case. The Miranda warnings did not induce silence; to the contrary, defendant affirmatively waived his rights and ultimately confessed. Moreover, he testified at trial to a version of the

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his Miranda rights, the Court also held that it did not apply to cases where the initial waiver was ambiguous. State v. Leyva, 906 P.2d at 899-901. The State disagrees with that portion of Leyva, and the Utah Supreme Court has granted certiorari to review the question.

events different from that he recounted to the police. Finally, he never invoked his right to silence after he waived it; at most, he failed to respond to one statement from Detective Thurgood that did not elicit a response. Therefore, the trial court correctly denied his motion for a new trial on this basis.

B. Alternatively, references to defendant's post-Miranda silence were harmless beyond a reasonable doubt.

The trial court denied defendant's motion for a new trial because it found that, even assuming an error occurred, the error had not prejudiced defendant (R. 207). Because any error was harmless beyond a reasonable doubt, the record fails to show that the trial court clearly abused its discretion. See State v. Bartley, 784 P.2d 1231, 1237 (Utah App. 1989)(applying the harmless beyond a reasonable doubt standard to an alleged Doyle violation).

A number of factors help determine whether an error is harmless beyond a reasonable doubt, including the strength of the State's case. State v. Villareal, 889 P.2d 419, 425-26 (Utah 1995)(citation omitted). In this case, the record contains overwhelming evidence of defendant's guilt independent from the testimony and cross-examination about which defendant complains. Most significantly, defendant admitted to Detective Thurgood that

he purchased the drugs because he wanted to get high (R. 490).[3]

Defendant also excessively minimizes the circumstantial evidence against him, acknowledging only Officer Grant's testimony and the videotape. Appellant's Brief at 11. However, when considered in its totality, the circumstantial establishes that defendant, not the driver, purchased the drugs.

Officer Grant testified that he saw two people approach the open, front passenger, not driver, window (R. 370-71). The first man left, the second engaged in what Officer Grant's experience told him was a drug transaction (R. 371-72). No one approached the driver's window. Officer Grant saw no movements to suggest that the driver leaned over to purchase the drugs, and defendant denied that he had passed the drugs or the money between the driver and the seller (R. 385, 562). Officer Grant saw the passenger pass money out of the window to the seller (R. 372). When Officer Kaufman and Detective Thurgood pulled the Escort over, they found defendant in the front passenger seat (R. 412, 482).

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[3]Defendant attempts to dismiss his confession as incredible. Appellant's Brief at 11. Defendant's argument ignores that, on appeal, credibility determinations are resolved against him. Cf. State v. Gordon, 913 P.2d 350 (Utah 1996) (on appeal from a jury verdict, the appellate courts view the evidence and all reasonable inferences in a light most favorable to that verdict).

Defendant admitted that the drug transaction occurred at Pioneer park, but denied confessing to the police and testified that the driver, not he, purchased "white" (cocaine) and "black" (heroin) (R. 560-61). Defendant's use of the street names showed he was no novice on the topic. Moreover, Detective Thurgood found cocaine and heroin under defendant's, not the driver's, seat; there was nothing else under the passenger's seat (R. 485, 491-93). Defendant acknowledged that he never saw the driver or rear passenger put the cocaine and heroin under his seat (R. 589, 592, 611). Detective Thurgood testified that the driver could not have placed it under defendant's seat because the seat rails blocked the way (R. 525). Defendant conjectured only that the cocaine and heroin discovered may have been left there from another purchase, and that the driver may have kept the cocaine and heroin from that day's purchase in his pocket (R. 588, 590).

At trial, defendant gave an incredible explanation about how he ended up innocently involved in a drug transaction, an explanation completely inconsistent with he pretrial confession. Defendant contended that he paid the driver five dollars to take him to see his girlfriend at about 400 East and 900 South, and that the driver took him to Pioneer Park first (R. 552). After the transaction, however, the Escort headed north toward

defendant's residence (R. 593-94, 616). Defendant also acknowledged that he was considerably larger than the driver and rear passenger, that he was not afraid of them, and that he could have left the car at any time (R. 587).

At trial, defendant partially bolstered his testimony by contending that the driver offered the officer an incredible explanation for going to Pioneer Park: that he went there to see a friend (R. 436). Even if incredible, the incredibility does not negate the evidence identifying defendant as the purchaser; at most, it suggests that the driver knew the purpose of going to the park from the beginning.

In support of his argument that the references to his silence prejudiced his case, defendant contends that the references were not "isolated" because there were two: Detective Thurgood's testimony and the prosecutor's cross-examination. Appellant's Brief at 12. Although there were two references, they were distinct and occurred at different times in the evidence (R. 490, 600-601). Moreover, the prosecutor made no reference to defendant's silence in his closing argument (R. 623-31). When weighed against his confession and the other circumstantial evidence of his guilt, these two brief references are harmless beyond a reasonable doubt.

Finally, defendant also complains that the trial court gave no immediate curative instruction. Appellant's Brief at 13. However, nothing in the record even suggests that defendant requested one. Having failed to request a curative instruction, defendant cannot complain on appeal when the trial court did not give one. See, e.g., State v. Malmrose, 649 P.2d 56, 61 (Utah 1982), overruled on other grounds, State v. Long, 721 P.2d 483 (Utah 1986).

Based on the above, any error was harmless beyond a reasonable doubt. This independently establishes that the trial court did not abuse its wide discretion when it denied defendant's motion for a new trial.

POINT II

THE FAILURE TO INFORM DEFENSE COUNSEL ABOUT A CHANGE IN TESTIMONY DID NOT IMPAIR DEFENDANT'S ABILITY TO PRESENT A DEFENSE; THEREFORE, THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR NEW TRIAL

Prior to trial, defense counsel interviewed Officer Kaufman, who told counsel that he could not remember if he searched the Escort (R. 419). Detective Thurgood only searched the area around the passenger seat (R. 484-85). In her opening statement, defense counsel pointed out purported inadequacies in the State's investigation, including the failure to search the entire Escort

(R. 349-50). At trial, Officer Kaufman testified that he had refreshed his memory and remembered searching the entire Escort (R. 419). He admitted in front of the jury, however, that he had not informed defense counsel of his refreshed memory, and that he originally told counsel that he could not remember searching the entire car (R. 421). The prosecutor first learned of the change the morning trial began, but did not inform defense counsel about the change (R. 468).

Defendant included the failure to inform the defense about the change in Officer Kaufman's memory to support his motion for a new trial (R. 135-38). The trial court denied the motion (R. 207). Because the trial court found any error harmless, it did not decide whether the State had violated its discovery obligations.

On appeal, defendant contends that Officer Kaufman's changed memory harmed his defense because, if counsel had known about it, counsel could have developed a theory consistent with the evidence. Specifically, defendant contends that, if counsel had known about the change, she "could have altered and salvaged the defense, by focusing solely on the state's failure to investigate and search the other occupants of the car, without putting the credibility of the defense in issue." Appellant's Brief at 16.

A prosecutor's failure to disclose newly discovered inculpatory evidence "might so mislead defendant as to cause prejudicial error." State v. Carter, 707 P.2d 656, 662 (Utah 1985). If defendant can make a credible argument that failing to disclose inculpatory evidence impaired the defense, the burden shifts to the State to establish that there exists no reasonable likelihood of a better result. State v. Knight, 734 P.2d 913, 921 (Utah 1987).

In this case, defendant has not met the threshold to shift the burden to the State. Despite the change in Officer Kaufman's testimony, defendant presented the jury with a cohesive defense. Defendant asserted that the State's evidence was consistent with his testimony that the driver, not he, purchased the drugs (R. 631-51). For example, defense counsel pointed out that Officer Grant could not see what was going on in the car, and specifically could not see what the driver was doing during the purchase (R. 634-35). Counsel also pointed out that Detective Thurgood found the drugs in the middle of the floor below the two foot by two foot seat, and that Officer Kaufman could not see what the other two occupants were doing during the time it took the driver to pull over (R. 642).

Defense counsel also relied on the driver's and rear

passenger's suspicious behavior to suggest that the officers improperly failed to investigate them, and that, if the officers had, they might have discovered evidence supporting defendant's testimony. Defense counsel pointed out that the driver took three quarters of a block to pull over, that the driver gave Officer Kaufman an incredible explanation for not pulling over when Officer Kaufman first turned on his lights and siren (that he did not see Kaufman only two cars behind him), that the driver gave an incredible explanation for going to Pioneer Park (that he went there to see a friend), and that he gave an incredible explanation for wanting to leave the scene (that he had left something cooking on the stove when he went to the park to see a friend) (R. 639-40). Counsel then pointed out that, despite this suspicious behavior, the police let the driver and rear passenger leave without searching them (R. 640).

Counsel also pointed out that the drug packages Officer Grant saw during the purchase were sufficiently small to put into a pocket or a sock (R. 637-38), but that Officer Kaufman released the driver and rear passenger without searching either of them (R. 640). Counsel developed the theme that the police acted on Officer Grant's report that the passenger (defendant) purchased the drugs and consequently narrowed their investigation to the

point that they could have easily overlooked evidence inculpating the other occupants (R. 637-39, 646-49).

The argument and evidence summarized above rebuts any claim that the changed memory impaired the defense. Therefore, defendant has not established the threshold to shift the burden to the State to establish that, had the State disclosed the memory change, there would exist a reasonable likelihood of a more favorable result.

Even if this Court did shift the burden to the State to establish the absence of prejudice, the record establishes that there is no reasonable likelihood of a more favorable result. First, as established, defendant still presented a defense based on the evidence introduced.

Second, defense counsel used the changed memory to attack Officer Kaufman's general credibility and to attack the credibility of the State's case. On cross examination, Officer Kaufman admitted that in the interview two days prior to trial he told defense counsel that he could not remember searching the entire car (R. 419). Counsel then elicited an admission that, during that interview, Officer Kaufman remembered where he was when he got Thurgood's transmission to pull the Escort over, remembered that he saw no furtive movements, remembered that he

approached the driver's side first and that Thurgood went to passenger's side, remembered that they approached the car simultaneously, remembered that he asked the driver why he went to Pioneer Park, remembered that the driver told him that he had gone there to see a friend, remembered asking the driver why driver took so long to pull over, remembered that the driver responded that he did not see Officer Kaufman, remembered that the driver took three quarters of a block to pull over, remembered that he kept the driver and rear passenger in the car three to four minutes, remembered that they detained the about twenty minutes more, but that he did not remember whether he searched the Escort (R. 444-46). In closing argument, counsel also relied on the change to attack the credibility of the State's case by arguing that the case seemed to get better as time passed (R. 641).

Third, as previously argued, defendant's version, although consistent with the evidence was not credible.

Finally, as noted in the previous argument, the State introduced overwhelming evidence of defendant's guilt, including his confession to the crime.

Based on the above, even if counsel had known about Officer Kaufman's enhanced memory, there would not exist a reasonable

likelihood of a more favorable result. See State v. Carter, 707 P.2d at 662 (failure to disclose inculpatory evidence was harmless error in light of other substantial evidence introduced at trial).

Defendant's appellate argument amounts to nothing more than a complaint that Officer Kaufman's change in memory meant that his trial counsel made a representation in opening argument that the evidence ultimately did not support. This complaint fails to make a credible argument that the failure to inform defense counsel about the memory change impaired defendant's defense, let alone that knowing about it creates the probability of a more favorable result. First, depriving defendant of arguing that no one searched the entire car cannot, by itself, establish an impairment to the defense: defendant could not rely on an untrue version of the events, and, as established above, he presented a defense based on the evidence introduced.

Second, defendant cannot rely on a general taint to the defense's credibility. Even though counsel represented that no one had searched the car, she also established that her statement was true based on what Officer Kaufman had previously told her (R. 421). Therefore, Officer Kaufman's testimony established that counsel had not lied to the jury; rather, she recounted the

facts as the State had presented them to her.

Because this record establishes that no reasonable likelihood of a more favorable result existed, the trial court properly denied defendant's motion for a new trial.

CONCLUSION

For the reasons argue above, the State requests that the Court affirm the trial court's denial of defendant's motion for a new trial.

RESPECTFULLY SUBMITTED this 12th day of Dec., 1996.

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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed by first-class mail, postage pre-paid, to the following on this 12th day of Dec, 1996:

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ADDENDA

ADDENDUM A

(15) All costs associated with recording and submitting data as required in this section shall be assumed by the submitting drug outlet.

History: C. 1953, 58-37-7.5, enacted by L. 1995, ch. 333, § 3.

Effective Dates. — Laws 1995, ch. 333, § 4 makes the act effective on July 1, 1995.

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the

substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Section 78-3a-2, and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person previously convicted under Subsection (2)(b), that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction for possession of a controlled substance as provided in this subsection, the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction he is guilty of a third degree felony.

(f) Any person convicted of violating Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or by a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person convicted of violating Subsection (3)(a) shall be punished by a civil penalty of not more than $5,000. The proceedings are independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is upon conviction guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (4)(a) is guilty of a third degree felony.

(5) Prohibited acts E — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) When it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be of benefit to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding Section 77-18-1, may if there is compliance with Subsection (9)(b), impose a minimum term to be served by the defendant, of up to ½ the maximum sentence imposed by law for the offense committed. For violations of this section, this subsection supersedes Section 77-18-4.

(b) (i) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney, or grand jury if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or afterwards by leave of court, but in no event later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or a later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant, provide him or his counsel with a copy of it, and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

(ii) The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence under Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record. Following the evidence, the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court, the defendant shall be sentenced under Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) For violations of this section, Subsection (9) supersedes Section 76-3-203.5.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(11) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(12) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(13) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

History: L. 1971, ch. 145, § 8; 1972, ch. 22, § 1; 1977, ch. 29, § 6; 1979, ch. 12, § 5; 1985, ch. 146, § 1; 1986, ch. 196, § 1; 1987, ch. 92, § 100; 1987, ch. 190, § 3; 1988, ch. 95, § 1; 1989, ch. 50, § 2; 1989, ch. 56, § 1; 1989, ch. 178, § 1; 1989, ch. 187, § 2; 1989, ch. 201, § 1; 1990, ch. 161, § 1; 1990, ch. 163, § 2; 1990, ch. 163, § 3; 1991, ch. 80, § 1; 1991, ch. 198, § 4; 1991, ch. 268, § 7; 1995, ch. 284, § 1.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, added the last sentence in Subsection (9)(a) and rewrote Subsection (9)(d) which read "Nothing in this section in any way limits or restricts Sections 76-8-1001 and 76-8-1002."

Cross-References. — Cities and towns, prohibitions of sales of narcotics to minors, § 10-8-47.

Psychotoxic chemical solvents, penalties for use or sale, § 76-10-101 et seq.

Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

NOTES TO DECISIONS

ANALYSIS